United States Circuit Court of Appeals for the Ninth Circuit

P. L. LAMPHERE, as administrator of the estate of C. ROY LAMPHERE, deceased and as the personal representative of said deceased,

Plaintiff in Error.

vs.

OREGON RAILROAD & NAVIGATION COMPANY, a corporation, and the OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a corporation,

Defendants in Error.

Brief of Defendants in Error

Upon Writ of Error to the United States Circuit Court for the Eastern District of Washington, Eastern Division.

W. W. COTTON, ARTHUR C. SPENCER, and RALPH E. MOODY,

Attorneys for Defendants in Error.

PACIFIC BANKER

In line five, page twelve, the word "openly" should read "often".

In the fourth line from the bottom of page thirty, the word "interstate" should read "intrastate".

In line three of the first paragraph on page thirty-seven, the words "interstate commerce" and the words "interstate commerce" in the last line of the paragraph should read "commerce interstate".

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ARGUMENT.

We agree with counsel for plaintiff in error that the employe does not engage in interstate commerce, but, as an employe, it is impossible for him to engage in it.

The Standard Dictionary, published by Funk & Wagnalls Company, defines the word "commerce" as follows:

"The exchange of goods, productions or property of any kind; especially, exchange on a large scale, as between states or nations. Extended trade."

"Interstate commerce: Interstate commerce between people living in different States of the United States, including transportation of property and carriage of passengers across State lines."

In the case of Welton v. Missouri, 91 U. S. 275 (23 Law Ed. 347), the Supreme Court of the United States defines commerce as follows:

"Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all of its forms; **including the transportation,** purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States."

So it will be seen from the above definitions that railroad companies only **engage** in interstate commerce by being **engaged** in the **transportation** of commerce, and it seems clear that this is the meaning which Congress intended to convey when it used the expression "engaging in commerce" in the Employers' Liability Act. However, we will deal with this question further anon.

Fellow Servant.

The court in its opinion said:

"It was conceded on the argument, by counsel

for both parties, that the deceased was killed through the negligence of his fellow servants, and that the complaint states no ground of recovery at common law. In view of this concession it is perhaps unnecessary to consider that phase of the case, but in any event the allegations of the complaint clearly show that the deceased and the servants, whose negligence caused his death were fellow servants of a common master at the time of the injury, within the rule which has long prevailed in the Federal courts.

Dayton Coal & Iron Co. v. Dodd, 188 Fed. 597, and cases cited."

It would seem that the statement of the court of the concession of counsel ought to be conclusive of the question. However, in their brief in answer to defendant's brief, on the demurrer to the plaintiff's amended complaint, counsel for plaintiff in error say:

"It is our contention, however, that decedent, at "the time of his death, was in the line of his duty, "and was killed through the negligence of a fellow "servant."

"In addition to the cases cited by defendant we "refer the court to the following:

"Where an employe of a railroad, while returning "from his dinner to his work, was injured by being "struck by a passing train negligently run by the en- "gineer, the servant was still in the master's ser- "vice, and a fellow servant with the engineer of the "train, at the time of the accident."

"Olson v. Andrews, 168 Mass. 261; 47 N. E. 90.

"Where an employe was injured while he was "walking from his house to his employment, he was "in the service of the master, and was doing that "which was essential to enable him to discharge "his particular duty, viz., going to the spot where his "duty was to be performed."

"Boldt v. N. Y. Ry. Co., 18 N. Y. 432.

"The above case was cited with approval and "followed in

"Mele v. Delaware & G. Canal Co., 27 Jones "& S. 367; 14 N. Y. Supp. 630.

"See also the folowing cases:

"Savannah F. & W. Ry. Co. v. Chancy, 102 "Ga. 814; 30 S. E. 437.

"O'Brien v. Boston & A. Ry. Co., 138 Mass. "387; 52 American Reports, 279.

"Ewald v. Chicago & N. W. Ry. Co., 71 Wis. "420; 5 American State Reports, 178; 36 N. "W 12, 591.

"Ryan v. Chicago & N. W. Ry. Co., 60 Ill. "171; 14 American Reports, 32.

"Adams v. Iron Cliffs Co., 78 Mich. 271; 18 "American State Reports, 441; 44 N. W. "270.

"Cowhill v. Roberts, 71 Hun 127; 24 N. Y. "Supp. 533.

"Affirmed in 144 N. Y. 649; 39 N. E. 493.

"In Dishon v. Cincinnati, B. O. & T. Ry. Co., "126 Fed. 194.

"Affirmed in 66 C. C. A. 345; 133 Fed. 471.

'Plaintiff's intestate was employed by defendant 'as a section hand, and lived, with others, in a section 'house near the track. Defendant's employes had 'been in the habit of cutting trains while standing 'on the tracks opposite the section house to afford 'access to and from the house across the tracks, and 'on the occasion of defendnat's death he and the 'other employes, after working hours, left the house 'to go to defendant's depot for their own purposes, 'and while deceased was passing between certain 'cars standing on a track the opening was closed and 'deceased was caught between the cars and killed 'through the alleged negligence of the train opera- 'tors in failing to give deceased any warning of 'their intention to do so. Held, that notwithstanding 'the injury occurred after working hours, the opera- 'tives in charge of the train were follow servants 'of the deceased, and that he, therefore, assumed 'the risk of injury from their negligence.'

"The court says:"

'It should be held that the servant assumed all 'the risk he runs, excluding that of the master and 'including that of the pure negligence of the co- 'selvants, whenever doing anything contemplated 'by his contract of employment, i. e., which under 'that contract it is his duty, or he has a right to 'do. In other words, it should be held that the as- 'sumption of risk by the servant is as broad and

'sweeping as the scope of action on his part required 'or authorized by the contract.'

In addition to the cases above cited the rule is laid down in 26 Cyc. at page 1289, as follows:

"Going to and from work. In a number of cases servants on their way to and from work have been held, although not actually on duty, to be fellow servants of other employes of the master engaged in the same common employment so as to relieve him of any liability for injuries received by them through the negligence of such other employes. This rule has been most frequently applied in the case of servants riding to and from work on the master's trains or other conveyances; but other cases hold that an employe in such a situation is not a fellow servant of other employes of the master, so as to exonerate him from liability for their negligence. This later view is in most instances based upon the different department limitation of the fellow servant rule, as recognized in a number of jurisdictions."

In support of the text that servants on their way to and from work are fellow servonts of other employes of the master engaged in the same employment, and that the rule has been most frequently applied in the case of servants riding to and from work on the master's trains or other conveyances, there is cited the following cases:

Mele v. Delaware, etc., Canal Co., 14 N. Y. Supp. 630.

Ewald v. Chicago, etc., Ry. Co., 70 Wis. 420; 36 N. W. 12, 491.

Southern Pac. Co. v. McGill, 5 Ariz. 36; 44 Pac. 302.

Bailey v. Garbutt, 112 Ga. 288; 37 S. E. 360.

Ellington v. Beaver Dam Lumber Co., 93 Ga. 53; 9 S. E. 21.

Baltimore, etc., Ry. Co. v. Clapp, 35 Ind. App. 403; 74 N. E. 267.

Ind., etc., Rapid Transit Co. v. Andis, 33 Ind. App. 625; 72 N. E. 145.

Kan. Pac. Ry. Co. v. Salmon, 11 Kan. 83.

McQuirk v. Shattuck, 106 Mass. 45; 35 N. E. 110 (laundress driving to work in master's coach held a fellow servant of the driver).

O'Brien v. Boston, etc., Ry. Co., 138 Mass. 387.

Gilman v. Eastern R. Corp., 10 Allen 233.

Seaver v. Boston, etc., Ry. Co., 14 Gray 466.

Gillshannon v. Stony Brook Ry. Corp., 10 Cush. 228.

Vick v. New York Cent., etc., Ry. Co., 95 N. Y. 267.

Russell v. Hudson River Ry. Co., 17 N. Y. 134.

McLaughlin v. Interurban Street Ry. Co., 91 N. Y. Supp. 883 (street car conductor riding on car during suspension of temporary duty, due to illness).

Manville v. Cleveland, etc., Ry. Co., 11 Ohio State, 417.

Sanderson v. Panther Lumber Co., 50 W. Va. 42; 40 S. E. 368.

Martin v. Atcheson, etc., Ry. Co., 166 U. S. 399; 41 Law Ed. 1051.

Louisville, etc., Ry. Co. v. Stuber, 108 Fed. 934.

In addition to these the following authorities are cited in the case of Dayton Coal & Iron Co. v. Dodd, 188 Fed. at pages 602 and 603, in support of the doctrine announced.

Kilduff v. Boston Elevated Ry. Co., 195 Mass. 307; 81 N. E. 191.

Bowles v. Ind. Ry. Co., 27 Ind. App. 672; 62 N. E. 94.

Ionnone v. New York & N. H. H. Ry. Co., 21 R. I. 432; 44 Atl. 592.

Saulese v. Lehigh Valley Ry. Co., 75 N. J. Law 798, 900; 69 Atl. 166.

Wright v. Ry. Co., 122 N. C. 852; 29 S. E. 100.

Roland v. Fift, 131 Ga. 683; 63 S. E. 133.

Tunney v. Midland Ry. Co., L. R. 1 C. P. 291.

Crenene v. Guest, etc., Ltd., L. R. 1 K. B., Div. 469.

Garre v. Colliery Ry. Co., L. R. 2 K. B., Div. 539.

Birmingham Ry. etc., Co. v. Sawyer, 156 Atl. 199; 47 S. 67.

We have examined the authorities above cited, with the exception of the English cases, and in our opinion they fully sustain the text quoted from Cyc., and we can not understand how any different legal principle can be involved in a case where a man is walking to his work and a case where a man is riding to his work.

In their brief presented to the court below counsel cited the case of Dishon v. Cincinnati, N. O. & T. Ry. Co., 126 Fed. 194, and say it is affirmed in 66 C. C. A. 345., 133 Fed. 471, and quotes the syllabus and a portion of the opinion.

In their brief in this court they use the following language:

"The case of Dishon v. Cincinnati, N. O. & T. Ry. Co., 126 Fed. 194, is not in point, and the case was affirmed in 133 Fed. 471, 66 C. C. A. 345, on the ground of contributory negligence, but the court intimated that in view of the case of Ellsworth v. Metheny, 104 Fed. 119, 44 C. C. A. 485, the holding of the lower court that decedent was still in the course of his employment (and, therefore, a fellow servant of those who killed him) was erroneous."

We submit that the Circuit Court of Appeals held nothing of the kind, and to sustain our contention we quote what the court said:

"The opinion of the court below upon this point of law is a well considered one, containing an in-

teresting review of the cases. In view, however, of the opinion of this court, in the case of Ellsworth v. Metheny, 104 Fed. 119, in which we held that a coal miner, who, during the noon hour, while not engaged in work, goes to a different part of the mine for the purpose of visiting with another miner, is not, while so absent, engaged in the line of his duty, so as to impose upon his employer the duty of a master, to see that the entries through which he passes from and to the part of the mine where he is employed are kept in safe condition for passage, **we prefer to base our judgment sustaining the action of the court below upon the fact that, whatever the capacity in which the deceased was crossing the track—whether as a private individual or as an employe, exercising a privilege as such**—and whether the railroad company was or was not guilty of negligence in closing the opening between the cars without warning the deceased by bell or whistle of the engine of what he mght expect, the testimony makes out a plain case of contributory negligence on the part of the deceased."

The position of counsel for plaintiff in error is not consistent with the position they took in the lower court. If they are now contending that the relation of fellow servants did not exist between the deceased and the operatives of the train by which he was killed, that contention can not be sustained in view of the cases heretofore cited.

One hardly knows how to characterize the serene self-assurance of counsel when they say, "From

what has been said we think the antinomies of the court's decision have been made apparent."

The decision contains no antinomies, and if any appear to counsel it is due to their lack of comprehension. They seem to be unable to understand how the decedent could have been in the **employ** of the defendant and still not have been **employed in interstate commerce.**

This brings us to the definition of the word **employed** as it was meant by Congress, and as Congress intended it should be understood when it used the word in the Employers' Liability Act. The manner in which counsel have attempted to apply the word shows their lack of comprehension of its meaning as used in the Act.

In Funk & Wagnalls Standard Dictionary the following is found as the definition of the word employ:

"Employ. To engage, have, or keep for or in service or duty; procure or retain the services of; set or keep at work; furnish work or occupation for; as, men are employed on the work; to employ an agent.

" 'That man's mind is apt to become small as a pin point who is **employed** all his life in making a pin point.' McCosh Emotions, Bk. 1, Ch. 1, p. 20, s. 80.

"2. To make use of instrumentally; as, to employ money in trade; to employ alcohol as a solvent; to devote to a certain occupation; apply; occupy, as to employ one's energy in study; to employ one's time in writing. 4. To enclose; enfold.

"Synonyms: hire, use. What is **used** is viewed

as more absolutely an instrument than what is **employed.** A merchant **employs** a clerk; he uses pen and paper; as a rule, **use** is not said of persons, except in a degrading sense, as, the conspirators **used** him as a go-between. That which is **used** is openly consumed in the using, or in familiar phrase, **used up;** as, we **used** twenty tons of coal last winter; in such cases we could not substitute **employ.** A person may be **employed** in his own work or in that of another; in the later case the service is always understood to be for pay. In this connection **employ** is a word of more dignity than **hire.** A general is employed in his country's service; a mercenary adventurer is **hired** to fight tyrant's battles.

Prepositions: Employ, **in, on, upon,** or about a work, business, etc.; **for** a purpose."

Counsel again show their misconception of the meaning of the word as used in the Act when they say, on page 7 of their brief, as follows:

"Therefore, what Congress meant by the words 'shall be liable for any damages to any person suffering injury by such carrier in such commerce' was that the carrier should be liable to every person suffering injury while such person was used by the carrier, while he was in the employ of the carrier; when he was made use of by the carrier; while he was performing some duty which had been required of him by such carrier, so long as the things done by the employe were in aid of, or incidental to, or necessary, expedient, or desirable in carrying on the interstate business of such carrier."

It is never proper to say that persons are **used** or **made use of,** except in a degrading sense. Persons are **employed;** instrumentalities are **used** or **made use of.**

Safety Appliance Act.

On this point we take occasion to show the inapplicability of the decisions interpreting the Safety Appliance Act to the facts in this case. It would seem that no argument was necessary to show that these decisions can be of no possible assistance in solving the question involved in this case. Counsel have cited the case of Johnson v. Southern Pacific Ry. Co., 96 U. S. 1, 49 Law Ed. 363, a case where a brakeman was injured while attempting to couple an engine to a dining car which was standing in a side track, and have quoted quite extensively from the opinion.

This car was an **instrument** of interstate commerce, and it is quite proper to say that it was **used** in such commerce.

Counsel for defendant in that case made the error which counsel for plaintiff in error in this case have pointed out when they urged that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually **engaged** in interstate commerce, or being put into a train for such use. This car could not be **engaged** in interstate commerce any more than the employe could.

The court clearly points out the distinction be-

tween an instrument used in moving interstate commerce and interstate commerce itself.

It would be absurd to say that the Safety Appliance Act did not extend and apply to an instrument of interstate commerce, even though the instrument at the time in question was not **used** in such commerce.

We have never contended for any such a rule, and have no dispute with counsel for plaintiff in error that a railroad company would be liable for an injury to an employe caused by its failure to comply with the Safety Appliance Act, although the instrument of interstate commerce about which the employe was working, was not, at the time of the injury, actually being **used** in interstate commerce, but the decisions interpreting that act, and its application to the relation of master and servant, throw no light upon the question involved in this case, because liability is sought to be predicated against the raiload company in this case under an act of an entirely different character.

Employment in Interstate Commerce.

We will now take up the question as to whether or not Lamphere was **employed** in interstate commerce at the time he sustained the injury which resulted in his death. Accepting the statement of counsel for plaintiff in error as true, that "the employe not only does not **engage** in interstate commerce, but, as an employe, it is impossible for him to **engage** in it by railroad or otherwise," we are

somewhat surprised to find them quoting so extensively from the opinion in the case of Colasurdo v. Central Ry. Co. of New Jersey, 180 Fed. 832.

They italicize a portion of the opinion as follows:

"I think it should therefore be construed as intending to include within the term 'person employed in such commerce' all those persons who could be so included within the constitutional power of Congress; that is to say, the Act meant to include everybody whom Congress could include."

This begs the question and is reasoning in a circle. The only persons whom Congress could include within the act were persons employed in interstate commerce, because Congress had no power to legislate as to anyone else.

To say that Congress could only include within the act those persons who are employed in interstate commerce, and then say that only those persons who are employed in interstate commerce are included within the act, is reasoning in a circle, and in no manner assists in determining what persons are employed in interstate commerce.

Keeping in mind the statement of counsel for plaintiff in error that the employe does not **engage** in interstate commerce, but, as an employe, it is impossible for him to **engage** in it, we are still more surprised to find counsel quoting from the opinion of the court as follows:

"I am therefore of the opinion that the plaintiff was at the time engaged in interstate commerce, and entitled to the rights secured by this act. That

being so, it is a matter of no consequence whether the train that struck him was engaged in that commerce or not. It is true that the act is applicable to carriers only 'while engaged' in interstate commerce, but that includes their activity when they are engaging in such commerce by their own employes. In short, if the employe was **engaged** in such commerce, so was the road, for the road was the master, and the servant's act its act."

Colasurdo, at the time of his injury, was employed in repairing a switch, and was struck by a train which was used between points within the State of New Jersey.

If it was impossible for the employe to have been **engaged** in interstate commerce (and we agree that it was), how could it be possible for the railroad company to have been **engaged** in interstate commerce by any act of the employe? The statement is the apogee of absurdity.

It is true that in the case of Zikos v. Oregon Railroad & Navigation Company, 179 Fed. 893, Judge Whitson held that a section man who was employed in repairing a track was within the provisions of the Employer's Liability Act. The question was brought up in that case also on a demurrer to the complaint.

But in the case of Tsmura v. Great Northern Ry. Co., reported in 108 Pac. at page 774, the Superme Court of Washington held that a man was not employed in interstate commerce who was employed by a railroad company at an agreed wage or hire, in the capacity of a common laborer in the

State of Montana, and who was, at the time of his injury, employed in the State of Washington, and was engaged in loading on a flat car a number of rails, and he while engaged in raising one of the rails from the ground and placing it on the car, certain of his co-employes, suddenly, violently and without due care, threw their end of the rail on the car in such a manner as to injure the plaintiff.

The court said:

"The respondent's theory seems to be that because the appellant was authorized to, and did at times, engage in interstate commerce, and because respondent was employed in loading a flat car with rails, which had been used, or were to be used, in the repair of its roadbed, in the State of Montana, he was necessarily engaged in interstate commerce within the meaning of the act. We can not assume that every employe of appellant, by reason of his employment, is so engaged. Appellant may have thousands of employes whose duties do not partake of that character. If the act in question is constitutional, it is so because it applies only to servants engaged in interstate commerce. If it is broad enough to include this case in its provisions; it is, in our opinion, open to the same objections which rendered the earlier act unconstitutional."

We are not unmindful of the fact that the court subjected itself to the criticism urged by counsel for the plaintiff in error in this case when it used the word **engage** with reference to the employe, but we think the decision is sound. As well might it be said that a man who was employed in repairing a race

track or shoeing a race horse was employed in racing, as to say that a man who was employed in repairing an instrumentality of interstate commerce was employed therein.

Counsel say on page 16 of their brief that because the word **employed**, as used in the act, is in the passive voice, it renders the construction contended for by them ineluctable. The construction contended for by counsel is not only far from being ineluctable, but it contains within itself in own refutation.

Congress knew that railroad companies did not **engage** in interstate commerce, except as they were **engaged** in the **transportation of** commerce from one state into another, and Congress also knew that the employes of railroad companies could not be **employed** in interstate commerce unless they were employed in the movement of such commerce.

We quote the language of Mr. Justice White in the case of Howard v. Illinois Cent. R. Co., 207 U. S. at page 498, in support of the proposition that the employe must be actually employed in the **movement** of interstate commerce in order to come within the provisions of this act. The language is as follows:

"The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the business in which the carriers or their employes may be engaged at the time of the injury, of necessity includes subjects wholly outside of the

power of Congress to regulate commerce. Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce **as to matters wholly independent of interstate commerce,** a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. **Take a railroad engaged in interstate commerce having a purely local branch operating wholly within a state.** Take again the same road **having shops for repairs, and, it may, be for construction work,** as well as a large **accounting** and **clerical force,** and having, it may be, **storage elevators, warehouses,** not to suggest, besides, the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and **local** messages. Take an express company engaged in **local** as well as interstate business. Take a trolley line, moving wholly within a state as to a large part of its business, and yet, as to the remainder, crossing the state line."

"**As the act includes many subjects wholly beyond the power to regulate commerce,** and depends for its sanction upon that authority, it results that the act is repugnant to the constitution." (The black face is ours.)

In view of the portion of the opinion of the learned chief justice just quoted we wonder at counsel's temerity in making the contention they do on pages 13, 14, 15 and 16 of their brief. The former act was declared unconstitutional because it imposed a liability upon the carriers in favor of any of their employes, **without qualifications or restriction as to the business in which the carriers or their employes might be engaged at the time of the injury.**

It seems to be the contention of counsel for plaintiff in error that the men who are employed in the shops of a railroad company where its engines are repaired, and upon its tracks and roadbed, and in and about its warehouses, etc., are employed in interstate commerce, although Mr. Chief Justice White specifically says they are not.

While we contend that the act applies only to train crews, we do not concede that it applies to all train crews. We contend that the act applies only to the employes of railroad companies who are employed in the movement of interstate commerce.

If the peculiar hazards which are connected with the movement of railroad trains, and the dangers incurred by the operatives of such trains were not in the mind of Congress at the time it passed the act, why did Congress confine its application to common carriers by railroad? It is because the movement of railroad trains is attended by peculiar hazards that this act can be sustained; otherwise it would be unconstitutional as class legislation,

as it only applies to common carriers by railroad, and does not apply to other persons engaged in interstate commerce.

We have said that we do not concede that the members of all train crews come within the provisions of the act, even though they cross a state line in running from one division point to another. We do not see how it is possible to bring within the provisions of the act members of the crew of a train which is used exclusively in carrying the mail, because while carrying the mail the railroad company is not a common carrier, but is an agent of the government, exercising a governmental function.

In 31 Cyc. 999 appears the following:

"A railroad company carrying the United States mails, whether under contract or by virtue of the requirements of the constitution and laws, is not, in respect to such service, a common carrier, but is a public agent of the United States employed in performing a governmental function."

In support of this there is cited:

Central R., etc., Co. v. Lampley, 76 Ala. 357; 52 Am. Rep. 334.

Boston Ins. Co. v. Chicago, etc., R. Co., 118 Iowa 423; 92 N. W. 88.

Bankers Mut. Casualty Co. v. Minneapolis, etc., R. Co., 117 Fed. 434; 54 C. C. A. 608.

An examination of the above cases will show that they support the text.

In 6 Cyc., page 375, it is said:

"No person is a common carrier in the sense of the law who performs the service without hire."

In support of this there is cited:

Choteau v. South Carolina R. Co., 16 Mo. 216.

Citizens Bank v. Nantucket Steam Boat Company, 2 Story 16; 5 Fed. Cases No. 2730.

In the case last cited Mr. Justice Story says:

"In the next place, I take it to be exceedingly clear that no person is a common carrier in the sense of the law who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier in all our books fully establishes this result."

This being so, a railroad company is not a common carrier while hauling gravel from its own pit in one state into another state to be used as ballast for its own track; nor would it be a common carrier while operating a construction or wrecking train, and the crews of such trains would not come within the provisions of the act, and we do not see how it can be claimed that a railroad was **engaging in interstate commerce** while operating its own trains exclusively in its own business and carrying nothing but its own property. If a member of this court owned a building in California and should come into Oregon to secure material to repair the same, we imagine it would require something more than the statement of counsel for plaintiff in error

to convince him that he was **engaging in interstate commerce** while hauling a load of his own lumber from Oregon into California in his own vehicle to repair his own building.

It is a known fact that when the President of the United States makes his "swing around the circle" the railroad companies over whose lines he travels, in their zeal to see that no accident happens to his train, send out in advance of it another train which is known in railroad parlance as a "way car bounce," which is composed of an engine and a way car. We do not think that the members of the crew of this train come within the provisions of the act, because while operating this train the railroad company would not be **engaging in interstate commerce,** nor would the members of the crew be employed therein.

In the case of Pederson v. Delaware L. & W. R. R. Co., 184 Fed. 737, the plaintiff was in the employ of the defendant and was employed to assist in the building of a track. Part of the track was to be laid upon a bridge, and plaintiff was hurt upon the uncompleted structure while carrying material from one part of the work to another. The new track when finished was intended for use both in local business and in commerce between the states, but the train by which the injury was inflicted was a purely local train running between two points in the State of New Jersey.

In his opinion Judge McPherson says:

"First, the offending carrier must at the time

of the injury be engaging in commerce between any of the several states, etc., and second, the injury must be suffered by the employe while he is employed by such carrier in such commerce. Both these facts must be present or the act does not apply—the carrier must be actually engaging in interstate commerce and the employe must also be taking part therein. If, therefore, the business being done by the carrier is purely intrastate, and in the course of such business it injures an employe, the act does not apply. Neither does it apply, although the business being done by the carrier is commerce between the states, if the injured employe is engaged in work that does not properly belong to such commerce."

On page thirteen of their brief counsel took exception to the statement of the court that decedent was not employed in interstate commerce. Indeed, "not employed in commerce of any kind." This statement is absolutely true. Decedent was in the employ of the defendants, but he was not employed in commerce of any kind. Counsel would have us believe that the decedent would have been employed in interstate commerce if he had been standing on the depot platform waiting for the train which he was to board.

Counsel ask why Congress did not include within the provisions of the act the vast army of men whose efforts are just as necessary to the carrying on of interstate business as are the activities of train crews. Our answer is that Congress

does not possess the power to legislate as to any of the employes of the defendant except those who are employed in interstate commerce, maugre the fact that their efforts are just as necessary to the carrying on of interstate commerce as are the activities of those who are employed therein.

Further as to the Safety Appliance Act:

The construction applied to the Safety Appliance Act, upholding the power of Congress to require common carriers engaged in interstate commerce to equip the cars used in such service with safety appliances, does not imply that Congress may regulate the relations of master and servant engaged and employed in such commerce, for the reason that the Safety Appliance Act is alone addressed to the use of an instrument of interstate commerce, and upon that ground such legislation has been sustained. The Employers' Liability Act is applicable only to individuals or corporations employed or engaging in interstate commerce by railroad, and the reference to the title of the two acts points out the distinction above made.

Safety Appliance Act:

"An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes."

Employers' Liability Act:

"An act relating to the liability of common carriers by railroad to their employes in certain cases."

In the Safety Appliance Act the subject directly treated is the promotion of the safety of the employes and travelers by compelling the common carrier to equip their cars with safety appliances, while in the other act the subject directly treated is that of the liability of the master to his servant.

There is a marked distinction between interstate commerce and the instrumentalities thereof, on one side, and the mere incidents which may attend the carrying on of such commerce, on the other.

Mr. Justice White in the Hooper case, 155 U. S. 648, observes on page 655 in referring to the distinction above stated:

"This distinction has always been carefully observed and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature."

In the case of Adair v. United States, 208 U. S. 161, the very essence of the decision is that a regulation of employer and employes may in certain

cases be permissible if it is a regulation of commerce, but that it must be shown to be a regulation of interstate commerce before it can be sustained, and it must bear some apparent logical relation to the **flow** of commerce in order to be sustained.

It is clear that the Safety Appliance Act applies to instrumentalities of interstate commerce, whether they are being used in interstate commerce or not, but the Employers' Liability Act only applies to persons who are actually employed in interstate commerce.

The confusion of the two acts by counsel for plaintiff in error is due to their attempt to use the words **employed** and **used** interchangeably, and to their inability to comprehend that it was possible for the decedent to have been in the employ of the defendants in error and still not have been employed in interstate commerce.

On page 20 of their brief counsel for plaintiff in error says:

"If it was the purpose of Congress to protect solely persons subject to the hazards peculiar to train operation, why did it not say 'or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, track or roadbed?'"

Our answer to this question is that Congress did say this. Counsel for plaintiff in error seems to be unable to understand what Congress did say. Congress said:

"That every common carrier by railroad while engaging in commerce between any of the several

states or territories, or between any of the states or territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia and any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of the death of such employe, to his or her personal representative * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Thus it will be seen that a common carrier by railroad engaging in interstate commerce is liable for the injury or death of any of its employes, while employed in interstate commerce, due to the negligence of other employes, and also the common carrier by railroad, while engaging in interstate commerce, is liable for the injury or death of any of its employes employed in such commerce, caused by any defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment due to its negligence. So it is clear that a common carrier by railroad engaging in interstate commerce would not be liable to such employe for any injury caused by a defect in its roadbed or equipment due to the negligence of fellow servants, and that the defenses of contributory negligence and assumption of risk in such

cases would be available to the carrier; but if the injury was caused by any defect in its roadbed or equipment due to the negligence of a vice principal, these defenses would not be available to the carrier. This is the reason that Congress put into the act the provision that the common carrier should be liable to the servant for injuries caused by reason of the defects in its roadbed and equipment due to its negligence. Heretofore no recovery could be had by a servant against the master for injuries caused by defective machinery, if the defect was open and obvious, unless there had been a promise to repair by the master. If the defect or insufficiency of its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment is due to the negligence of a fellow servant and not the negligence of a vice principal, the defense of assumption of risk and contributory negligence may be pleaded as a defense to an action for such injuries, and the character of the act determines whether or not a man is a vice principal or fellow servant.

The case of United States v. Morris, 29 U. S. 464, 475, 10 Law Ed. 543, is not relevant to the question we are now considering. We will concede that a railroad company would be engaging in interstate commerce when it started one of its trains loaded with interstate commerce, although the train had not gone beyond the territorial limits of the state in which the shipment started, and we will also concede that the members of that train crew would be employed in interstate commerce, but we

cannot see how it may be said that any member of that crew would be employed in interstate commerce while he was walking from his home to the place where the train was standing preparatory to starting on its trip into another state.

Nor do we see how it is possible to bring within the provision of the act members of the crews of trains, the cars of which are loaded with interstate commerce, where the railroad on which the cars are being moved is operated wholly within the territorial limits of a state, or the members of train crews of trains running between division points wholly within the territorial limits of a state, because Mr. Chief Justice White says "That a railroad company engaging in interstate commerce, **when operating a purely local branch, wholly within a state,** is not engaging in interstate commerce," and if the railroad company is not engaging in interstate commerce when operating a branch line wholly within the state, the members of the crews of the trains operated on such branch line are not employed in interstate commerce, even though some of the cars of the trains are loaded with commodities which come from other states.

Nor can we see how it may be said that the members of a switching crew employed by a carrier engaging in interstate commerce are employed in such commerce while switching a car loaded with interstate commodities.

The statement that the decedent at the time of his death was not engaged in anything is true. It is true that he was in the **employ** of the defendants,

but he was not **employed** in interstate commerce. Would he have been engaged in anything or employed in anything if he had passed safely through this opening between the cars and was standing on the platform of the depot waiting for the train? We do not see how it is possible to say that decedent would have been employed in interstate commerce if he had been standing on the platform of the depot waiting for his train, although he would have been nearer to his destination than he was at the time he was injured.

On page 51 of their brief counsel say:

"But says the court below, Lamphere was killed through the negligence of fellow servants. How, we ask, can a person be a fellow servant of the persons injuring him unless he himself, at the time of the injury, is performing a fellow service, something contemplated by his contract of employment?"

How, we ask, have counsel the temerity to ask such questions as these when they themselves, in their brief presented to the lower court, contended that decedent and the members of the train crew, whose negligence it is alleged caused the injury, were fellow servants, and cited authorities to support the proposition?

We do not know how to characterize the conduct of counsel when they make the following statement on page 52 of their brief: "But here we have the anomalous condition of a court's declaring that decedent was a fellow servant and not a fellow servant; that decedent when killed was in the line of his duty and not in the line of his duty; that

he was working for the company and not working for the company; that he was being used in interstate commerce and not being used in interstate commerce; that he was engaged in doing something and not engaged in doing anything."

Counsel were forced to concede the law to be that decedent and the members of the train crew causing the injury were fellow servants, and the court said that while decedent was walking from his home to the depot he was not **employed** in interstate commerce.

Counsel for plaintiff in error seem to be unable to comprehend how it is possible for the relation of fellow servants to exist among all the employes of a common master although some of the employes may not be actually employed in any particular line of work.

We wish the court to keep in mind that the Employers' Liability Act applies only to common carriers by railroad engaging in interstate commerce, and that section 3 provides that in an action brought by an employe under or by virtue of any of the provisions of this act the employe's contributory negligence may be considered by the jury and the damages diminished in proportion to the amount of negligence attributable to such employe, and then provides "that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of **any statute enacted for the safety of employes contributed** to the injury or death of an employe."

Section 4 of the act provides:

"That in any action brought against any common carrier under and by virtue of any of the provisions of this act to recover damages for injuries to or the death of any of its employes, such employes shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of **any statute enacted for the safety of employes** contributed to the injury or death of such employe."

Counsel cite the case of Barrett v. City of New York et al., 189 Fed. 68, which holds that where express companies took packages of merchandise coming from other states at railroad or steamer terminals and transported them by wagons through the streets and avenues of New York to the consignee, such business was a part of interstate commerce, and not subject to city ordinances licensing the business of expressmen within the city. The relevancy of this case is not apparent.

To show the confusion which exists in the minds of counsel for plaintiff in error we quote from page 21 of their brief as follows:

"Now, it is a well known fact that many railroads, like the Northern Pacific Railway Company, instead of hauling cars for other express companies, conduct, as a part of their business, an express department. Certainly a driver of an express wagon if injured through the negligence 'of any of the officers, agents or employes of such carrier or by reason of any defect or insufficiency due to its negligence in its cars * * * appliances,

machinery * * * or other equipment' (which would include his express wagon and harness, or a motor driven carriage, if used), if such an expressman should be injured while in the performance of his duty he certainly would be 'employed by such carrier in such commerce,' and he would not be injured in the operation of any train, nor would his employment subject him to hazards peculiar to train service."

We will concede for the purposes of this argument that a driver of an express wagon would be **employed** in interstate commerce, but he would not come within the provisions of the Employers' Liability Act because he would not be employed in interstate commerce by **railroad,** and the express company would not be engaging in interstate commerce by **railroad** while it was engaging in interstate commerce by **wagon.** No doubt the express company would be engaging in interstate commerce, as was held in the case of Barrett v. City of New York (supra), but the Employers' Liability Act only applies to common carriers by **railroad** engaging in interstate commerce.

If it were not for the special hazard connected with the operation of railroad trains, this act would have to be declared unconstitutional as being class legislation, inasmuch as it only applies to common carriers by railroad engaging in interstate commerce, and it is because of the peculiar hazards connected with the operation of trains that the act can be sustained and justifies the classification of common carriers by railroad.

Congress permitted the defense of contributory negligence to be interposed in actions brought under or by virtue of the provisions of the Employers' Liability Act, but declared that this defense should not be a bar to the action but should be considered in fixing the amount of damages or in diminution of the amount claimed. Congress absolutely prohibited the interposition of the defense of contributory negligence in an action brought under or by virtue of any of the provisions of the Employers' Liability Act where the violation by the common carrier of **any statute enacted for the safety of employes** contributed to the injury or death of such employe.

By Section 4 Congress barred the defense of assumption of risk to an action brought under or by virtue of any of the provisions of this act where the violation by such common carrier of any **statute enacted for the safety of employes** contributed to the injury or death of such employe.

Now then, is it not clear that Congress, by the enactment of the Employers' Liability Act, created a cause of action in favor of the personal representatives for the damages sustained on account of the death of a person caused by the negligent act of another, which cause of action did not exist at common law?

At common law the employe of a railroad company had a cause of action against the railroad company for injuries sustained through the failure of the railroad company to comply with its common law duty to exercise reasonable care to provide him

with a safe place in which to work and safe tools to work with, provided the employe was not guilty of contributory negligence. The representative of an employe killed by the negligence of the railroad company had no action at common law against the railroad company because the cause of action did not survive. By the Employers' Liability Act this cause of action survives to the personal representatives of the decedent when the death results "in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Now this act must be so interpreted as to effectuate the object of Congress in passing it. The decisions interpreting state statutes abolishing the fellow servant rule as to employes of railroad companies are of no assistance in interpreting this act, because state legislatures possess all the powers of legislation except those which are prohibited by either the state or federal constitutions, while Congress possesses only the powers of legislation which are granted to it by the federal constitution.

This legislation being confined in its application to only one class of common carriers engaging in interstate commerce, there must be some reasonable basis for this classification; otherwise the act would be unconstitutional. It can be sustained upon no other basis than that of the peculiar hazard necessarily incident to the movement of railroad

trains. We are not permitted to speculate as to whether Congress might have legislated as to persons who do not come within the provisions of this act. This act was scrutinized and revised by some of the ablest lawyers in the country in the light of the opinion of the Supreme Court which declared the former act unconstitutional. These men knew that the only way railroad companies could engage in interstate commerce was by the transportation of articles of interstate commerce, and they knew that Congress had no power to pass any legislation affecting the relations of the employes with the railroad company except while the railroad was engaging in the transportation of interstate commerce and while the employe was employed in such transportation.

When the only possible way in which a railroad company can engage in interstate commerce is by transporting articles of interstate commerce, how can an employe of a railroad company be employed in interstate commerce unless he is employed in assisting in the transportation of articles of interstate commerce?

In the case of St. Louis I. M. & S. Ry. Co. v. Conley, 187 Fed. 949, the United States Circuit Court of Appeals for the Eighth Circuit says on page 952:

"The primary object of the act was to promote the safety of employes of railroads while actively engaged in the **movement** of interstate commerce. * * *"

We think this was not only the primary object but the only object of the act, and that Congress had no power to enact any statute affecting their relations with the railroad company unless they were thus employed.

We will close this brief with a quotation from the opinion of the court which we think is a correct statement of the law:

"For the purposes of this case I deem it sufficient to say that a locomotive fireman is not, while on the way from his home to the depot for the purpose of taking a train to a distant point as a part of a deadhead crew, there to fire an engine hauling an interstate train, employed in interstate commerce."

Respectfully submitted,

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